

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	No. 1:96CV01285
Plaintiffs,)	(Judge Lamberth)
v.)	
)	
GALE A. NORTON, Secretary of)	
the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER
REGARDING PLAINTIFFS' NOTICE OF DEPOSITION OF ROSS SWIMMER**

On January 20, 2004, without any prior communication to counsel for Defendants, Plaintiffs noticed the deposition of Ross Swimmer, Special Trustee for American Indians, Department of the Interior, for January 28, 2004 ("Notice of Deposition") (attached as Exhibit 1). Plaintiffs are not permitted to depose Mr. Swimmer because they are not entitled to any discovery at this time. Moreover, the lack of any proceedings makes it impossible to determine whether the requested discovery would be within the scope of permissible discovery under Rule 26(b). Accordingly, pursuant to Rule 26(c), Defendants move for a protective order preventing the noticed deposition of Mr. Swimmer.¹

^{1/} As required by Rule 26(c), and Local Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs on January 22, 2004 in an attempt to resolve this dispute without Court action. Plaintiffs expressed an intent to oppose the relief requested here.

ARGUMENT

I. NO DISCOVERY IS AUTHORIZED AT THIS TIME

Plaintiffs are not authorized to take any discovery at this time. Fact discovery for the Phase 1.5 trial closed on March 28, 2003, the trial itself was concluded six months ago, and the Court ruled upon the issues raised therein on September 25, 2003. There is no indication in the Court's October 17, 2002 Phase 1.5 Trial Discovery Schedule Order that the Plaintiffs were authorized to conduct roving discovery after the Phase 1.5 trial.

In addition, nothing in the structural injunction issued by the Court on September 25, 2003, provides for further discovery. The Court's injunction establishes a series of deadlines through September 30, 2007, for the Department of the Interior to perform specific tasks.² Under the schedules established by the Court's September 25, 2003 orders, a Phase II trial is likely, and it is possible that there will be discovery associated with it.³ However, there is no discovery order setting a discovery schedule for a Phase II trial. There are also no other proceedings before the Court requiring discovery.

Finally, even if the noticed deposition of Mr. Swimmer was purportedly related to some future proceeding in this case, the parties have not held a discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f) and, therefore, Plaintiffs are not authorized to take any

² Defendants have filed a notice of appeal of the September 25, 2003 structural injunction, and the Court of Appeals issued an administrative stay of that injunction on November 12, 2003. Plaintiffs, therefore, have no basis for seeking to inquire about what Defendants are presently doing to comply with the structural injunction.

³ Defendants note and reassert their continuing objection to discovery on the ground that such discovery is improper in an Administrative Procedure Act case. For that purpose, we incorporate by reference the arguments set forth in Defendants' Motion for Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior at pages 5-7 (November 10, 2003).

discovery. Fed. R. Civ. P. 26(d), 30(a)(2)(C), 34(b). Because no discovery is permitted at this time, the Court should issue a protective order to prevent the requested discovery.

II. THE REQUESTED DISCOVERY CANNOT BE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

Because the scope of any future proceedings in this litigation remains undefined, it is impossible to determine, and Plaintiffs cannot show, that the requested discovery would be within the scope of the Federal Rules. Under Rule 26(b)(1), parties may only obtain discovery regarding matters that are “relevant to the claim or defense of any party” Fed. R. Civ. P. 26(b)(1). Although information need not be admissible at trial to be discoverable, it still must be “[r]elevant” information and must be “reasonably calculated to lead to the discovery of admissible evidence.” Id.

During the meet and confer discussion initiated by Defendants’ counsel on January 22, 2004, Plaintiffs’ counsel identified as potential areas of inquiry Mr. Swimmer's recent statements to Time magazine concerning fees charged on certain IIM transactions, the "to be" project, and "Navajo issues," but stated that any deposition would not necessarily be limited in scope to those topics. The topics that Plaintiffs' counsel did identify may or may not be relevant in the future in this litigation, depending on the nature and scope of future proceedings. However, the absence of any proceeding scheduled at this time containing triable issues of fact makes it premature, if not impossible, to determine whether discovery into these topics, or any others, would be relevant and reasonably calculated to lead to the discovery of admissible evidence. Under the circumstances, Plaintiffs’ attempt to take discovery at this time is no more than a roving

investigation without any discernible bounds that is untethered to any proceeding. Such discovery is not permissible under Rule 26.

CONCLUSION

For these reasons, Defendant's Motion for a Protective Order should be granted.

Dated: January 26, 2004

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Timothy E. Curley
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
TIMOTHY E. CURLEY
D.C. Bar No. 470450
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on January 26, 2004 the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Ross Swimmer* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

Kevin P. Kingston
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
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v.)	Case No. 1:96CV01285
)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

ORDER

This matter comes before the Court on *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Ross Swimmer* (Dkt. #_____). Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Defendants' Motion for a Protective Order is GRANTED; and it is further

ORDERED that Plaintiffs are precluded from deposing Mr. Swimmer at this time.

SO ORDERED.

Date: _____

ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 2044-0875
Fax (202) 514-9163

Dennis M. Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, N.W., Box 6
Washington, D.C. 20005
Fax (202) 318-2372

Keith Harper, Esq.
Richard A. Guest, Esq
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
Fax (202) 822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Earl Old Person (*Pro Se*)
blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,

Plaintiffs

v.

GALE NORTON, Secretary

Defendants.

Case No.1:96CV01285 (RCL)

NOTICE OF DEPOSITION

To: J. Christopher Kohn
United States Department of Justice
Civil Division
1100 L Street, NW, Room 10036
Washington, DC 20005
202.514.9163 (fax)

Attorney for Defendants

cc: Earl Old Person, Pro se
BlackFeet Tribe
P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

PLEASE TAKE NOTICE, that unless otherwise expressly agreed to by the parties in writing, on January 28, 2003, at the offices of Dennis M. Gingold, **607 14th Street, N.W., 9th Floor, Washington D.C. 20005**, plaintiffs in this action will take the deposition of **Ross Swimmer**, Special Trustee, Department of Interior, 1849 C Street, N.W., Washington, D.C. This deposition will commence at **10:00 a.m.** and will continue from day to day until completed. Testimony will be recorded by stenographic means.

Respectfully submitted,

/s/ Dennis Gingold

Of Counsel:

JOHN ECHOHAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
303-447-8760

DENNIS M. GINGOLD
D.C. Bar No. 417748
P.O. Box 14464
Washington, D.C. 20044-4464
202 824-1448

/s/ Keith Harper

KEITH HARPER
D.C. Bar No. 451956
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
202 785-4166

Attorneys for Plaintiffs

January 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF DEPOSITION was served on the following via facsimile, pursuant to agreement, on this day, January 20, 2004.

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

J. Christopher Kohn
United States Department of Justice
Civil Division
1100 L Street, NW, Room 10036
Washington, DC 20005
202.514.9163 (fax)

/s/ Geoffrey Rempel

Geoffrey M. Rempel